

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of )  
PUBLIC UTILITIES COMMISSION )  
Instituting a Proceeding to Investigate )  
Implementing a Decoupling Mechanism for )  
Hawaiian Electric Company, Inc., Hawaii )  
Electric Light Company, Inc., and Maui )  
Electric Company, Limited )

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DOCKET NO. 2008-0274

PUBLIC UTILITIES  
COMMISSION

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FILED

**TAWHIRI POWER LLC'S MOTION FOR RECONSIDERATION OF  
ORDER DENYING MOTION FOR ENLARGEMENT OF TIME  
TO FILE MOTION TO INTERVENE;**

**MEMORANDUM IN SUPPORT OF MOTION;**

**DECLARATION OF COUNSEL;**

**AND**

**CERTIFICATE OF SERVICE**

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**TAWHIRI POWER LLC'S MOTION FOR RECONSIDERATION OF  
ORDER DENYING MOTION FOR ENLARGEMENT OF TIME  
TO FILE MOTION TO INTERVENE AND  
MEMORANDUM IN SUPPORT OF MOTION**

TO THE HONORABLE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII:

MOVANT, TAWHIRI POWER LLC, a Delaware limited liability company ("Movant") hereby moves the Hawaii Public Utilities Commission ("Commission") for an order granting reconsideration of Order Denying Movant's Motion for Enlargement of Time to File Motion to Intervene, pursuant to Hawaii Revised Statutes § 269-6 and §§ 6-61-41 and 6-61-137 of the Rules of Practice and Procedure before the Public Utilities Commission, Chapter 61 of Title 6 of the Hawaii Administrative Rules ("HAR").

In support of its Motion, Movant submits the following Memorandum in Support of Motion:

1. Movant:

Movant is a Delaware limited liability company and a Qualifying Facility ("QF") with a

Power Purchase Agreement with Hawaii Electric Light Company, Inc.<sup>1</sup>. Movant's full name and business address is as follows:

Tawhiri Power LLC  
551 Pilgrim Drive, Suite D  
Foster City, California 94404

All correspondence related to this Docket should be sent to:

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and

Mr. Anthony B. Pace  
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2. Procedural History of this Docket:

The Commission initiated this docket by its order on October 24, 2008 to address the issues related to implementation of a decoupling mechanism for the HECO Companies.<sup>2</sup> In the Initiating Order, the Commission named the HECO Companies and the Consumer Advocate as

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<sup>1</sup> See The Restated and Amended Power Purchase Contract for As-Available Energy between Hawaii Electric Light Company, Inc. and Apollo Energy Corporation, dated October 13, 2004 (the "RAC"). The RAC was approved by the Commission in Docket No. 04-0346, *In the Matter of the Application of Hawaii Electric Light Company, Inc. for Approval of a Restated and Amended Power Purchase Contract with Apollo Energy Corporation, and a Commission determination that the HELCO-Owned Interconnection Facilities can be constructed above the surface of the ground, pursuant to Hawaii Revised Statutes sec. 269-27.6(a)*. On December 5, 2005, Apollo Energy Corporation's interest under the RAC was assigned to Movant. Consequently, Movant has replaced Apollo Energy Corporation as a party to the RAC.

<sup>2</sup> See *Order Initiating Investigation* in Docket No. 2008-0274 ("Initiating Order"). "Hawaii Electric Companies" or "HECO Companies" collectively refer to Hawaiian Electric Company, Inc., Maui Electric Company, Limited, and Hawaii Electric Light Company, Inc.

parties to the proceeding and invited any interested individual, entity, agency, or community or business organization to file a motion to intervene or participate without intervention in the Docket pursuant to HAR Chapter 6-61.<sup>3</sup>

Although they were not named parties to the proceeding, the Commission served a copy of the Initiating Order to Kauai Island Utility Cooperative ("KIUC") and its counsel on the same day as it was issued, October 24, 2008.<sup>4</sup> The Commission did not serve a copy to any other entity of the public.

Notice of the Docket was provided to the rest of the public on October 29, 2008 by a Docket Sheet in the Commission's *Daily Activity Report*.<sup>5</sup>

Movant learned of the Docket on October 30, 2008 after 4:30p.m.<sup>6</sup>

Movant filed a Motion to Intervene and a Motion for Enlargement of Time to File Motion to Intervene on November 17, 2008.<sup>7</sup>

On November 26, 2008, the HECO Companies filed a Memorandum in Opposition to Movant's Motion for Enlargement of Time to File Motion to Intervene and Motion to Intervene ("HECO's Memorandum In Opposition").

On December 2, 2008, Movant filed a Motion for Leave to File Reply to the HECO's Memorandum In Opposition.

On December 3, 2008, Movant filed its Reply to the HECO's Memorandum In Opposition. Also, the Commission issued its Order Granting Intervention; Dismissing as Moot Motions for Leave to File Reply Memoranda; Denying Motion for Enlargement of Time to File

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<sup>3</sup> *Id.*

<sup>4</sup> See Certificate of Service attached to Order.

<sup>5</sup> See Exhibit "A" to Movant's Motion for Enlargement of Time to File Motion to Intervene filed on November 17, 2008.

<sup>6</sup> See Declaration of Sandra-Ann Y.H. Wong attached hereto and made a part hereof ("Wong Declaration").

<sup>7</sup> It was, and still is, Movant's position that its Motion to Intervene was timely filed on November 17, 2008 since the public notice occurred on October 29, 2008. However, Movant filed its Motion for Enlargement of Time to File Motion to Intervene as a precaution if the Commission did not agree with its position.

Motion to Intervene; and Extending the Deadlines to File a Stipulated Procedural Order, Stipulated Protective Order, and Joint Decoupling Proposal (“Order Denying Motion for Enlargement of Time”).<sup>8</sup>

3. Standard of Review for Motion for Reconsideration:

The Commission’s Practice and Procedure Rule 6-61-137 provides that Motions for Reconsideration must set forth “grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.”

4. The Commission’s Order Denying Movant’s Motion for Enlargement of Time to File Motion to Intervene Is, With All Due Respect, Unreasonable, Unlawful, and Erroneous Because it Violates Movant’s Due Process Right to Sufficient Notice.

Due Process requires that Movant have twenty (20) days from public notice to file its Motion to Intervene. The United States Supreme Court has held:

The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement. **There must be due notice** and opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the Commission must act upon evidence and not arbitrarily.<sup>9</sup>

In the instant case, it is clear that Movant did not have the full twenty (20) days to file its Motion to Intervene in this proceeding. The Initiating Order was filed herein on October 24, 2008, but the public, with the exception of KIUC, did not receive notice of the Initiating Order until October 29, 2008, when it was posted in the Commission’s Daily Activity Report.<sup>10</sup> The Commission in its Order and the HECO Companies in its Memorandum in Opposition do not dispute that notice of the Order was not recorded in the Commission’s Daily Activity Report on

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<sup>8</sup> The Order did not address Movant’s Motion for Leave to File Reply to the HECO Companies Memorandum in Opposition.

<sup>9</sup> Pac-West Telecomm, Inc. v. Pacific Centrex Services, Inc., CA PUC, Decision 0804-004; Case 07-08-026, 4/10/08 citing Railroad Commission of California v. Pacific Gas & Electric Company (1937) 302 U.S. 388, 393-394.

<sup>10</sup> Supra. at 5. The Movant did not receive Notice of the Initiating Order until October 30, 2008. See Wong Declaration at 2.

October 29, 2008; **Five (5) calendar days AFTER the Commission filed the Initiating Order.**<sup>11</sup>

Even assuming the “excusable neglect” standard is to be applied to Movant’s Motion for Enlargement of Time, Movant respectfully disagrees with the Commission that it failed to meet this standard.<sup>12</sup> “The excusable neglect standard is a strict standard requiring a showing that the failure to timely file with the commission was due to circumstances beyond TPL’s [Movant’s] control. Lack of legal sophistication and ignorance of the law do not constitute excusable neglect.”<sup>13</sup>

Movant is not claiming lack of sophistication and of the law in the instant proceeding as support for the Commission to accept its Motion to Intervene. Instead, Movant argues if its filing was late it was “due to circumstances beyond its control”.<sup>14</sup> Movant had no control over when the Commission would provide public notice via its Daily Activity Report. Nor did Movant have any other means of knowing of the existence of the Initiating Order until it was posted in the Daily Activity Report. The Commission has set a long-standing procedure of providing public notice of new investigations (dockets) via its Daily Activity Report. Therefore, the Movant, as well as the other members of the public, have come to rely on the Daily Activity Report.<sup>15</sup> The failure of the Daily Activity Report to be regularly and timely updated deprives Movant of the twenty (20) days notice and, thus, is a violation of its due process rights.<sup>16</sup>

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<sup>11</sup> Compare Order Denying Motion for Enlargement of Time and HECO’s Memorandum in Opposition with Exhibit “A” to Movant’s Motion for Enlargement of Time to File Motion to Intervene filed herein on November 17, 2008.

<sup>12</sup> Order Denying Motion for Enlargement of Time at 9-10.

<sup>13</sup> Id. at 9 (citations omitted)

<sup>14</sup> Notwithstanding this “excusable neglect” alternative argument, Movant continues to maintain that its Motion to Intervene was timely filed.

<sup>15</sup> In fact, Haw. Rev. Stat. § 91-2 (b) provides that no order is valid or effective against any person until it is published or made available for public inspection. Therefore, the Initiating Order is not effective against members of the public and the 20-day clock did not commence until October 29, 2008

<sup>16</sup> Application of Utilities, Inc. of Pennsylvania for approval to begin to offer, render, furnish or supply wastewater disposal and treatment service to the public in additional territory in West Bradford Township, Chester County, Pennsylvania, Pennsylvania Public Utilities Commission, A-230013F0003 (Feb. 12, 2004) (noting that due process

The Commission in its Order Denying Movant's Motion for Enlargement of Time states, "More importantly, TPL's position in the Enlargement Motion that the deadline for intervention was November 18, 2008 is belied by the fact that TPL timely filed a motion to intervene in the feed-in tariffs docket, Docket No. 2008-0273, by November 13, 2008."<sup>17</sup> This fact is of no consequence because Movant's decision to file a Motion to Intervene in the feed-in tariff on November 13, 2008 does not negate the fact that in both the feed-in tariff docket and this proceeding it did not receive the full 20 days of public notice and, therefore, did not have timely and sufficient notice of this proceeding.<sup>18</sup>

Movant freely admits that it received notice of the Initiating Order on October 30, 2008.<sup>19</sup> However, the law is clear that due process not only requires notice, it requires **timely notice**.<sup>20</sup> In the instant case, instead of having 20 days to file its Motion to Intervene, Movant had only 15 days, violating its due process rights to timely notice and, therefore, it should be allowed to file its Motion to Intervene.<sup>21</sup>

5. Equity Beggars for the Commission to Grant Movant's Motion for Reconsideration.

Movant has provided sufficient evidence of lack of timely notice to warrant an inspection of the circumstances surrounding the updating of the Daily Activity Report and whether the same complies with Haw. Rev. Stat. § 91-2 (b). Thus, on equity grounds, the Commission should, at

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is flexible and calls for such procedural protections as the particular situation demands, and holding that because Commission did not provide notice as it routinely does and upon which the public has come to rely, it did not afford timely notice of the instant Application proceeding and was a violation of due process).

<sup>17</sup> See Order Denying Motion for Enlargement of Time at 10 (citations omitted).

<sup>18</sup> In fact, Movant attempted to file its Motion to Intervene in this proceeding on November 13, 2008, but was not permitted by the Commission because it attempted to file at approximately 4:33p.m. Thus, Movant decided to fine tune its Motion to Intervene and file by the twenty (20) day deadline of November 17, 2008. See Wong Declaration at 3.

<sup>19</sup> See Wong Declaration at 2.

<sup>20</sup> In re: Application for a rate increase in Collier County by Naples Sewer Company d/b/a Naples Industrial Park, Ltd. Florida Public Service Commission: Docket No. 900757-SU; Order No. 24922 (August 16, 1991)(held that untimely notice, although received before deadline, was a violation of due process.

<sup>21</sup> Supra. at 16 (lack of notice constitutes good cause for late filing of a Petition to Intervene).

least, give Movant the benefit of the doubt and allow Movant to Intervene.<sup>22</sup> This is especially true if no harm will be done by Movant's intervention.<sup>23</sup>

In the instant case, no harm would be done to these proceeding by allowing Movant to intervene. In the Order Denying Movant's Motion for Enlargement of Time, the Commission also extended the time to file a Stipulated Procedural Order and Stipulated Protective Order to December 22, 2008, and the time for the HECO Companies and the Consumer Advocate to file their joint proposal on decoupling to February 17, 2009. Hence, no substantive action has occurred in this Docket to date and, therefore Movant's Intervention would not delay the proceeding.

Moreover, Movant is cognizant of the proposed timetable set out in the Comprehensive Agreement and the Initiating Order and, thus, will work with the Commission and the other parties to meet them. In that event, Movant, as an intervenor, would not object to the Commission precluding any party in this Docket from unreasonably broadening the issues or unduly delaying the proceeding.

Also, in the Order Denying Movant's Motion for Enlargement of Time, the Commission granted the Motions to Intervene of all other entities that filed Motions to Intervene. In doing so, the Commission noted it "has generally been permissive in allowing intervention in policy-making investigative dockets, such as this docket. The commission finds it appropriate to be consistent with that approach in this docket, and allow intervention to all parties who filed motions to intervene."<sup>24</sup> This is especially true because this proceeding was opened pursuant to the Comprehensive Agreement which promotes transparency and input by all stakeholders.<sup>25</sup>

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<sup>22</sup> *Supra*, at 9 (held that if only as a matter of equity, if reasonable doubt has been established as to receiving adequate notice, it would be preferable to allow the party to respond).

<sup>23</sup> *Id.*

<sup>24</sup> See, *Order Denying Motion for Enlargement of Time* at 7 (footnote omitted).

<sup>25</sup> In the Comprehensive Agreement the Signatories "committed to being open and truthful" with the community.



Accordingly, Movant respectfully requests that the Commission reconsider its Order Denying Movant's Motion to Intervene and grant Movant's Motion for Reconsideration and allow Movant Intervenor status in this Docket.

6. The Commission Should, Respectfully, Exercise Its Discretion and Grant Movant's Motion for Enlargement of Time Since Movant Possesses Unique Expertise, Knowledge, and Experience to Assist the Commission in Establishing a Sound and Complete Record.

The Commission's Practice and Procedure Rule 6-61-23 gives the Commission the discretion to grant Movant's Motion for Enlargement of Time and, thus, Movant respectfully request that the Commission grant Movant's Motion for Reconsideration and allow it Intervenor status in the Docket. Movant possess unique expertise, knowledge, and experience to assist the Commission in establishing a sound and complete Record.<sup>26</sup> Most importantly, Tawhiri will bring to the Docket a consultant and witness, Dr. Mohamed El-Gasseir. Dr. El-Gasseir has extensive experience and knowledge in regards to: (1) the HECO systems; (2) electric industry restructuring; (3) stranded assets, revenue dynamics and rate stability issues; (4) renewable energy economics; (5) distributed resources planning; (6) self-generation assessment; and (7) integrated resource planning. These areas of expertise are part of the knowledge base that would be needed in the consideration of Decoupling issues. Additionally, Dr. El-Gasseir has advised regulatory and planning commissions for the States of California, New York, Connecticut, New Jersey, and Nevada. He has also been engaged by many utilities, including some of the largest investor-owned companies such as Con Edison of New York, Commonwealth Edison of Chicago, Pacific Gas & Electric, Detroit Edison, Southern Energy,

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See Comprehensive Agreement at 1. Additionally, the Signatories have stated publicly numerous times that the general public would have many opportunities to intervene in the process. Since the Decoupling Mechanism is being handled through regulatory avenues, Intervention in this Docket is the only way to insure public input.

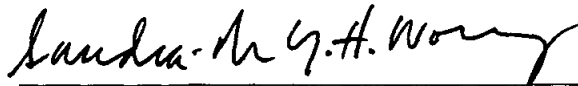
<sup>26</sup> See Section 9 of Movant's Motion to Intervene filed herein on November 17, 2008.

and British Columbia Hydro (to name a few).<sup>27</sup> All of these areas of expertise by Tawhiri and Dr. El-Gasseir will enhance the discussion on developing and implementing a workable decoupling mechanism and will lead to a sound record for the Commission.

VI. CONCLUSION

WHEREFORE, Tawhiri respectfully requests that the Commission grant its Motion for Reconsideration of Order Denying Motion for Enlargement of Time and to grant Movant Intervenor status in this Docket, or, alternatively, to grant it Participant status and permit it to submit Position Statements and/or Testimony.

DATED: Honolulu, Hawaii, December 15, 2008.



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SANDRA-ANN Y.H. WONG  
HARLAN Y. KIMURA

Attorneys for Movant  
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<sup>27</sup> Please note, that there were errors in Dr. El-Gasseir qualifications in Movant's Reply to the HECO Companies. The corrections have been made and are reflected in this Motion for Reconsideration.

STATE OF HAWAII )  
 ) ss  
CITY AND COUNTY OF HONOLULU )

1. I am one (1) of the attorneys of record for Movant, Tawhiri Power LLC, herein and make this declaration based upon personal knowledge gained in that capacity.

3. On behalf of Movant, I did attempt to file its Motion to Intervene in Docket No. 2008-0274 on November 13, 2008, but was prevented to do so by the Commission because it was approximately 4:33 p.m. Thus, the Movant decided to fine tune its Motion to Intervene and file by the twenty (20) day deadline of November 17, 2008.

Dated at Honolulu, Hawaii, this 15<sup>th</sup> day of December 2008.

SANDRA-ANN Y.H. WONG

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration was duly served on each of the following parties via United States Mail, postage prepaid, as set forth below:

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DATED: Honolulu, Hawaii, December 15, 2008.



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